Filed 6/13/19 P. v. Martinez CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL MARTINEZ, Defendant and Appellant.	B284282 (Los Angeles County Super. Ct. No. GA087334) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on May 28, 2019, be modified as follows:

1. On page 10, first sentence of the second full paragraph, the word "not" is inserted between the words "could" and "have" so that sentence reads:

> In light of the entire record, the jury could not have relied on any of these statements or generalized threats to find Martinez guilty of making criminal threats.

This modification does not change the judgment.
The petition for rehearing is denied.
NOT TO BE PUBLISHED.

DHANIDINA, J. LAVIN, Acting P. J. EGERTON, J.

Filed 5/28/19 P. v. Martinez CA2/3 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL MARTINEZ, Defendant and Appellant.	B284282 (Los Angeles County Super. Ct. No. GA087334)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Manual Martinez (Martinez) of committing forcible rape, false imprisonment, making criminal threats, and inflicting corporal injury against his ex-girlfriend, Eva G. On appeal, Martinez contends the convictions must be reversed because the prosecutor misstated the burden of proof during closing argument and the trial court failed to give a unanimity instruction after the prosecutor did not elect a specific statement on which to rely in support of the criminal threats charge. We reject both contentions and affirm the judgment.

BACKGROUND

Martinez was in a relationship with Eva G. for four years. Near the end of the relationship, Martinez moved into the apartment Eva G. shared with her 11-year-old daughter. Shortly after he moved in, Eva G. broke up with Martinez because she was concerned their relationship was negatively impacting her daughter and because Martinez was "involved in things" with which she did not agree.

After the relationship ended, Martinez met Eva G. at her apartment on September 4, 2012. Eva G. reiterated that she no longer wanted to be in a relationship with him. Martinez became agitated, hitting the floor and his head with his hands. He then locked the door to the apartment and yelled at Eva G. to pull her pants down because she was "going to be fucked." He said in Spanish, "Te va a cargar tu puta madre" which translates to "[y]ou're going to die here" or "I will beat the shit out of you." Martinez told Eva G. that he was going to count to five for her to pull her pants down and she responded, why don't you pull them down yourself? When Eva G. asked Martinez if he was going to rape her, he said that he was. Martinez then grabbed Eva G. by

the waistline, squeezed her neck, and bit down on her shoulder very hard.

Martinez took Eva G. to her daughter's bedroom and pushed her down onto the bed. He got on top of her and put his hands on her neck. Martinez made a fist with his right hand with one knuckle protruding and pointed it towards Eva G., as if he was going to punch her. Eva G. thought Martinez was going to kill her so she told him she would do whatever he wanted. Martinez got off of Eva G. and followed her into the living room. Martinez then pushed Eva G.'s face into the sofa, pulled off her pants, performed oral sex on her, and penetrated her vagina with his penis until he ejaculated. Afterward, Martinez cried and told her he would not be able to look at her in the face after what he did to her. Martinez left the apartment, but not before telling Eva G. he would speak to her in three days to see if she still cared about him or wanted to be with him.

Eva G. did not initially call the police because she was afraid that Martinez might hurt her or her daughter. In the past, Martinez had told Eva G. that he was associated with a Mexican drug cartel and would kill her if she tried to flee to Mexico. Eva G. did tell her family members about the rape, however, and they in turn called the police. A Los Angeles County Sheriff's deputy responded to the call and noticed that Eva G. had marks on her neck and redness on her shoulder. The sexual assault nurse who examined Eva G.'s found her injuries consistent with her description of the rape. A DNA analysis of vaginal and anal swabs taken from Eva G. during the exam revealed the presence of Martinez's DNA.

An information charged Martinez with forcible rape (count 1), criminal threats (count 2), false imprisonment

(count 3), and corporal injury to a spouse or cohabitant (count 4). During jury selection, the trial court analogized the elements of a crime to the ingredients for a recipe. When the trial court asked jurors for an example of a sandwich, a prospective juror suggested peanut butter and jelly sandwich. The trial court took the example and explained that a peanut butter and jelly sandwich must have three ingredients, i.e., bread, peanut butter, and jelly, to be a peanut butter and jelly sandwich, just as a crime must have every element.

In closing argument, the People referred to the trial court's analogy, stating, "So what are the elements? Do you remember all the time the judge spent with you talking about the peanut butter and jelly sandwich? Do you remember that? Do you remember him telling you you might have a big old tub of peanut butter and, like, the biggest loaf of bread with the biggest thickest slices you could find, and then you have jam, and you need all of them in there? Well, guess what? These are the elements. This is the peanut butter and the jelly. [¶] You may have more of one than another; but, see, there is no requirement that . . . you . . . have a tub of peanut butter for each one. You might have all this peanut butter falling out of the sandwich and just a dab of jelly; but if you got the jelly in that sandwich with the thickest of loaves and the most obscene amount of peanut butter, you still have a peanut butter and jelly sandwich. You just have to make sure you have enough of everything. [¶] So what do the People have to prove? This is where my burden comes in. What did I have to present to you? I had to bring you the evidence from that box that proves each and every one of these elements beyond a reasonable doubt." Martinez

understandably did not object to the People's statements during argument.

The jury convicted Martinez on all counts. The trial court sentenced Martinez to the midterm of six years for count 1, the low term of 16 months for count 2, the low term of 16 months for count 3, and the low term of two years for count 4. The trial court imposed concurrent sentences on counts 2 through 3 and stayed count 4.

DISCUSSION

I. The People did not misstate their burden of proof

Martinez's first contention is that the prosecutor committed misconduct when she analogized the elements of a crime to the ingredients of a peanut butter and jelly sandwich during closing argument. Specifically, Martinez contends that by using the term "dab of jelly" and referring to the amount of evidence in relation to each element, the prosecutor reduced her burden of proof to something less than beyond a reasonable doubt and suggested to the jury that they should weigh the evidence quantitatively, rather than qualitatively. We disagree.

A prosecutor is prohibited from misstating the law to reduce its burden to prove each element of a crime beyond a reasonable doubt. (*People v. Centeno* (2014) 60 Cal.4th 659, 666.) However, "[a]dvocates are given significant leeway in discussing the legal and factual merits of a case during argument." (*Ibid.*) "Counsel trying to clarify the jury's task by relating it to a more common experience must not imply that the task is less rigorous than the law requires." (*Id.* at p. 671.) Reasonable doubt analogies in argument have not been categorically disapproved and each claim of error must be evaluated on a case-by-case

basis. (*Id*. at p. 667.) "When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*Ibid*.)

Here, the People did not err by analogizing the elements of a crime to the ingredients of peanut butter and jelly sandwich. We disagree with Martinez's contention that the analogy suggested to the jury that the evidence should be evaluated quantitatively, rather than qualitatively. On the contrary, the analogy suggests the opposite—that each element may not have the same amount of evidence in support, but the jury must still evaluate the evidence qualitatively, not quantitatively. And, after making the sandwich analogy, the People went on to state that they were required to prove each element beyond a reasonable doubt. Thus, on its face, the analogy is not a misstatement of law that reduces the People's burden of proof.

Further, even assuming the analogy during closing argument misstated the law, "[w]hen argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Arguments from counsel "are usually billed in advance to the jury as matters of argument, not evidence, [citation], and are likely viewed as the statements

of advocates," not "binding statements of the law." (*Boyde v. California* (1990) 494 U.S. 370, 384; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.)

The trial court spent considerable time during voir dire explaining the peanut butter and jelly analogy to ensure the prospective jurors understood what it meant by elements of a crime. The trial court also instructed the jury on the People's burden of proof, the elements of each crime, and the jury's duty to weigh evidence qualitatively. The trial court's explanation of the analogy during voir dire and its comprehensive instructions to the jury placed the peanut butter and jelly analogy into the proper context and eliminated any risk that the jury would apply the wrong standard.

Accordingly, we find no error in the People's statements during closing argument.[1]

---

[1] The People argue we should decline to review its statements on appeal because Martinez failed to object to the statements in the trial court. " ' "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct." ' " (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) However, " ' "[i]mproper remarks by a prosecutor can ' "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." ' " ' " (*Ibid.*) Here, Martinez's fundamental right to due process protection against conviction except upon proof beyond a reasonable doubt is the question before us, thus, we reject the People's forfeiture argument.

II. A unanimity instruction was not required

Martinez's second contention is that his conviction must be partially overturned because the trial court failed to give a unanimity instruction sua sponte after the People presented more than one statement that could have supported the jury's guilty verdict on count two for making criminal threats. Again, we find no error.

In California, a jury verdict in a criminal case must be unanimous (*People v. Collins* (1976) 17 Cal.3d 687, 693) and each individual juror must find, beyond a reasonable doubt, that the defendant committed the specific offense he is charged with (*People v. Russo* (2001) 25 Cal.4th 1124, 1132). To ensure a criminal conviction is based on a unanimous jury verdict, if the evidence suggests more than one discrete crime, the prosecution must elect among the crimes or the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499–1500.) We review instructional errors de novo. (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

To the extent that Martinez is arguing that multiple statements contemporaneous with the rape on September 4, 2012 were discrete crimes, the unanimity instruction was not required because "the acts alleged are so closely connected as to form part of one transaction." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) The continuous course of conduct exception arises when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 572.) The "one transaction" or continuous conduct rule also applies when the defendant offers essentially the same defense to each of the acts, and there is no

reasonable basis for the jury to distinguish between them. (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

Eva G. testified that on the day of the incident, after she told Martinez she did not want to be with him anymore, he closed the door and locked it, and told her that she was "going to be fucked there." She understood Martinez's statements to mean "you're going to die here." The interpreter explained that the phrase used, "[t]e va a cargar tu puta madre," is an idiomatic expression, which could mean "I will beat the shit out of you," or "I'm going to fuck you over until you're done." Eva G. also said she felt threatened when Martinez said he would call her or she should call him in three days to see if she still cared about him.

These statements were made in a single continuous course of conduct where Martinez threatened Eva G. with rape or death, then physically assaulted and raped her. The closeness of these statements in time to each other and to the rape itself are in stark contrast with the authority cited by Martinez. In *People v. Melhado* (1998) 60 Cal.App.4th 1529, the defendant threatened his mechanic twice on the same day after the mechanic refused to return his vehicle. Defendant threatened to blow the mechanic up with a grenade and then left only to return two hours later to make the same threat. (*Id.* at p. 1533.) In that scenario, the trial court was required to give an unanimity instruction because the jurors could have relied on either threat to convict the defendant. That is not case here. Martinez went to Eva G.'s apartment, threatened her, and then raped her. There is no way to meaningfully separate these events. Martinez also did not offer a separate defense to each statement, but instead attacked Eva G.'s credibility generally, contending that Eva G. fabricated the story to obtain a nonimmigrant visa. The jury resolved the credibility

dispute against Martinez and there is no reason to conclude that the jury could have found the defense applicable to one of Martinez's statements, but not the others.

However, Eva G. also testified about several statements Martinez made prior to the date of the rape. Martinez told her he was part of a Mexican drug cartel and that he would retaliate against her if she did not do what he wanted. Martinez also told Eva G. that if she tried to leave him, or go to Mexico, he would find her and kill her. Eva G. testified that that Martinez was generally threatening and would "threaten [her] a lot" during the relationship. There was no evidence presented as to when these statements were made, only that they were said during Martinez and Eva G.'s four-year relationship.

In light of the entire record, the jury could have relied on any of these statements or generalized threats to find Martinez guilty of making criminal threats. Every relevant event took place on September 4, 2012 and these other statements were offered for a different purpose such as whether the relationship between Eva G. and Martinez had ended at the time of the rape and why Eva G. was hesitant to and did not call the police. The prosecutor, Martinez's counsel, and the trial court indicated to the jury that the crimes at issue arose from the events of September 4, 2012. During closing argument, the People told the jury to focus on the threats made on September 4, 2012, stating, "Count 2 is the criminal threats. There were a number of them, but let's focus. He did tell her that she was his and he was not going to have anyone else with her, which is consistent. Why would he take the phone? He also told her he would kill her, and she feared that. She told you that she did. She told you under the circumstances that she feared that. She feared that after she

felt his hands around her neck, and she feared that after she felt the bite. She feared that after he took her in the bedroom and strangled her. She was in sustained fear; and if you take all the circumstances around it, it's reasonable that she would feel that fear." During opening statement, Martinez's counsel told the jury, "As you've heard, we are about to parachute into September 4, 2012. We are going to—the evidence is going to take us back in time and back to a time when—the demise of a relationship, that of Eva G. and . . . Martinez." In its oral and written instructions to the jury the trial court stated that the crime is alleged to have occurred on or about September 4, 2012. The People, Martinez, and the trial court were unequivocal about the relevant date and each of them made this point apparent to the jury.

Lastly, Martinez was charged with only one count of making criminal threats on or about September 4, 2012. Although the verdict forms did not reference the September 4, 2012 date, they indicated that the jury found Martinez guilty of making criminal threats as charged in the information. Thus, although the People did not elect a specific statement on which to rely, it is clear that they were not pursuing charges for any other statements, except those on September 4, 2012.

We find no instructional error.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.